SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
Counsel for Appellant.

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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.,
Interveners.

STATEMENT AS TO JURISDICTION.

This suit was instituted in the District Court of the United States for the Southern District of New York under Section 402 (a) of the Communications Act of 1934 (47 U. S. C. Sec. 402 (a)) to set aside, annul and permanently enjoin the enforcement of an order of the Federal Communications Commission denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting", dated May 2, 1941, as amended by order dated October 11, 1941, promulgating regulations applicable to radio stations engaged in chain or network broadcasting. Plaintiff moved for a preliminary injunction, and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. The statutory three-judge court dismissed the

complaint for want of jurisdiction over the subject matter of the action (44 F. Supp. 688). On appeal (No. 1026 of the October Term, 1942) the Supreme Court of the United States reversed the decision of the statutory court and remanded the suit for further proceedings in conformity with the Supreme Court's opinion (316 U. S. 407). Following reargument on the defendant's motion to dismiss the complaint or for summary judgment and the plaintiff's motion for a preliminary injunction, the statutory three-judge court dismissed the complaint on the merits and at the same time, on its own motion, restrained the Federal Communications Commission from enforcing the regulations here in question until February 1, 1943, or the argument of the appeal in the Supreme Court, whichever is earlier.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioner, in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represents:

I.

Statutory Provisions Believed to Sustain Jurisdiction.

The statutory provisions believed to sustain the jurisdiction of this appeal are:

Section 402 (a) of the Communications Act of 1934, 47 U. S. C. Sec. 402 (a), which makes the provisions of the Urgent Deficiencies Act applicable to this suit; and

The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220; 28 U. S. C. Secs. 47, 47a, which provides for direct appeal to the Supreme Court of the United States from judgments or decrees of three-judge courts constituted under the Act.

II.

Statute of the United States and Order Promulgated Thereunder, the Validity of Which Is Involved.

The Federal Communications Commission, purporting to act under the authority of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U. S. C. Secs. 151-609, made the orders hereinafter set forth.

"Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Commission Order in Docket No. 5060

IN THE MATTER OF THE INVESTIGATION OF CHAIN BROADCASTING

May 2, 1941.

"WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs

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"[1] The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network; *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

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[2] The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE, *Secretary*.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

"FEDERAL COMMUNICATIONS COMMISSION,

Washington, D. C.

October 11, 1941.

ORDER

"At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

"The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

"It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be, and the Same is Hereby, Amended in the following particulars:

"Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a net work organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options [3] for network

[3] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [4] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m.[5] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"The last paragraph of said order is hereby amended to read as follows:

'It Is Further Ordered, That these regulations shall become effective immediately: *Provided,* That with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.'

T. J. SLOWIE,
Secretary.

"[4] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

"[5] These segments are to be determined from each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa."

The pertinent provisions of the Communications Act of 1934 are:

"Section 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[6] and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a Commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided and which shall execute and enforce the provisions of this Act.

"Sec. 3. For the purposes of this Act, unless the context otherwise requires—

"(h) 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.

"(p) 'Chain broadcasting' means simultaneous broadcasting of an identical program by two or more connected stations."

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[6] The provision relating to the promotion of safety of life and property was added by 'An Act to amend the Communications Act of 1934, etc.' Public No. 97, 75th Congress, approved and effective, May 20, 1937."

"Sec. 4. • • •

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

"(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commission shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense."

"Sec. 215. • • •

"(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

"Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place

in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act."

"SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

"(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

"(d) Determine the location of classes of stations or individual stations;

"(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharp-

ness of the emissions from each station and from the apparatus therein;

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commision shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

"(h) Have authority to establish areas or zones to be served by any station;

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

"(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

"(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

"(l) Have authority to prescribe the qualifications of station operators, to clasify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commision finds qualified;

"(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) Has violated any provision of any Act, treaty, or convention binding on the United States, which the Commision is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

* * * * * * *

"(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or con-

vention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

"(o) Have authority to designate call letters of all stations;

"(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

"(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

"SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise."

"SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

"(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

"(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

"(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which effect the granting of original applications.

"(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license."

"SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by

the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

"(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

"SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall

notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

"(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

"(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

"(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act."

"SEC. 310. (a) The station license required hereby shall not be granted to or held by—

"(1) Any alien or the representative of any alien;

"(2) Any foreign government or the representative thereof;

"(3) Any corporation organized under the laws of any foreign government;

"(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

"(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or

representative thereof, or by any corporation oganized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

"Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

"(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

"SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combina-

tions, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation."

"SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

"(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: *Provided however,* That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writ-

ing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue."

"SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any license shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however*, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

"SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or

otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof

may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce."

"SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

"(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or

otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit."

"SEC. 602. (a) The Radio Act of 1927, as amended, is hereby repealed.

"(d) The first paragraph of section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopilies, and for other purposes', approved October 15, 1914, is amended to read as follows:

'SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows;' "

III.

Date of Judgment or Decree and Date of Application for Appeal.

The date of the decree sought to be reviewed is November 16, 1942, on which day the said decree was made and entered.

The application for this appeal was made on November 25, 1942.

IV.

Nature of the Case.

The complaint filed pursuant to Section 402 (a) of the Communications Act of 1934, as amended, alleged, among others, the following facts:

The plaintiff is engaged in the business of operating a nationwide network broadcasting system, the operations consisting essentially of furnishing radio sustaining and sponsored programs for simultaneous broadcasting by radio stations to which the programs are transmitted by wire. Most of these stations are neither owned nor leased by plaintiff, and the network programs are furnished to them pursuant to contracts with the stations, known as affiliation contracts.

The affiliation contracts provide, among other things, and subject to certain conditions and exceptions, that the station will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations except to broadcast special events of public importance; that the plaintiff will not furnish its network programs to any other station in the city in which the station is located, except in case of public emergency; and that the station will, upon not less than 28-days' notice

from plaintiff, broadcast all network sponsored programs furnished to it by plaintiff, subject to conditions therein specified. The contract is usually for a term of five years. These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts are indispensable to the efficient operation of the plaintiff's business and are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its public goodwill.

The stations operate solely by virtue of licenses issued by the Federal Communications Commission. By Regulations 3.101 to 3.105, inclusive [set forth *supra* under part II hereof], the Federal Communications Commission has determined that it will not license any station having such affiliation contract after the effective date of the Regulations.

The licenses held by stations having affiliation contracts with plaintiff come up for renewal at various times commencing in the immediate future. Since the stations fear the loss of their broadcasting licenses, as a result of the Regulations, they will not negotiate for, enter into or renew affiliation contracts with the plaintiff, and, as a result of the Regulations, have threatened to cancel and repudiate their affiliation contracts. Many stations have notified plaintiff that because of the Regulations they will not be bound by their affiliation contracts after the Regulations become effective.

The Regulations impair seriously the ability of plaintiff to compete for national advertising; to maintain its identity and the public goodwill which it has built up since its inception, and to render a wide public service of informing, educating and entertaining the nation. The Regulations will make the operation of plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to

change the fundamental character of its business and render its property and business less valuable. A network system of broadcasting, such as presently operated by plaintiff, and based upon the affiliation contracts containing the provisions alleged, is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country.

The complaint further alleges that the order promulgating the rules is illegal and void and beyond the statutory power or authority of the Commission, and that if the Communications Act purports to authorize the Commission to make the regulations complained of, the said Act is an unconstitutional delegation of legislative power contrary to Article I, Section 1, of the Constitution of the United States, takes the property of plaintiff without due process of law in violation of Amendment V thereto, and constitutes an abridgement of the freedom of speech and of the press contrary to Amendment 1 thereto.

The effect of Regulation 3.106 [set forth *supra* under part II hereof], as construed by the Commission in its report, is to require that plaintiff dispose of one of the standard broadcast stations owned by it, to raise serious doubts whether plaintiff will be permitted to continue its ownership of two others, and to require plaintiff to dispose of its stations in any other locality where the Commission finds the existing standard broadcast stations to be so few or of such unequal desirability that competition would be substantially restrained.

The complaint sets forth the irreparable injury which the plaintiff would suffer as a result of the Commission's order and for which plaintiff has no adequate remedy at law, and prays that the Court set aside, annul and permanently enjoin the enforcement of that portion of the Commission's order which promulgates the regulations complained of.

Following the decision of the Supreme Court reversing the decision of the three-judge statutory court dismissing the complaint for want of jurisdiction, the cause came on for hearing before the statutory court on the defendant's motion to dismiss or for summary judgment and on the plaintiff's motion for a temporary injunction. After argument, the Court dismissed the complaint on the grounds that the order of the Commission, as amended, was within the authority granted to the Commission by the provisions of the Communications Act of 1934, that the provisions of the Act authorizing the Commission to make said order are valid and that plaintiff was not entitled to a trial.

V.

Substantial Nature of the Questions Involved.

The questions raised upon this appeal are substantial.

1. With respect to the statutory authority of the Commission to make the orders here involved, the question is whether its regulatory power extends to control of the terms upon which stations may contract with network organizations to secure a dependable supply of network programs. There is no provision of the Act in which such authority is given in terms. And we submit that the language of Section 303(i) and the other provisions in the Act together with the legislative history show that such authority cannot be implied. We also submit that the reasoning of the opinion of the Supreme Court of the United States in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-476, supports the interpretation of the Act for which we contend. An additional substantial question on statutory authority is whether the Commission may by general regulations substantially deny licenses to affiliated stations without hearing

on the facts relating to those particular stations respectively.

2. The passages in the Commission's report indicating that its orders were predicated upon a belief that it had the power and duty to enforce the purposes which the anti-trust laws were designed to achieve, by denying licenses to any station which is engaged in practices which in its judgment are unduly restrictive of competition, raise the question whether, if the Court agrees with our contention that such interpretation of the Act was erroneous, the orders must be set aside under the rule of such cases as *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433.

3. The interpretation of the scope of the statutory standard of "public interest, convenience and necessity" which is required to justify the orders here involved, we submit, makes its limits so vague and indefinite as to constitute an invalid delegation of legislative power in contravention of Article I, Section 1, of the Constitution of the United States. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schecter Poultry Corp.* v. *United States*, 295 U. S. 495, 540. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 145; *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, 285; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24.

4. The question whether the Act, if construed to authorize the Commission to make the orders here in question, is invalid under the First Amendment to the Constitution of the United States, is raised, among other things, by the fact that the orders if enforced would put hundreds of stations off the air, for local as well as network service, if they did not comply with the Commission's requirements

with respect to the arrangements whereby they choose their program material. See *Lovell* v. *Griffin*, 303 U. S. 444.

5. If construed to authorize the Commission to make the order in question, the Communications Act of 1934 is invalid under the Fifth Amendment to the Constitution of the United States. The present regulations have no relation to the public good, but unreasonably and arbitrarily deprive plaintiff and its affiliated stations of their freedom of contract, which they have in no way abused, for the private benefit of other networks, stations and advertisers.

6. The regulations here in question are arbitrary and capricious in that they bear no reasonable or rational relation to the statutory standard of "public interest, convenience and necessity."

7. The question whether the plaintiff is entitled to a trial is raised by the facts that, as we submit, the hearings before the Commission and its decision thereon were legislative in character; that they were not held in pursuance of statutory requirements; that not even tentative drafts of regulations had been proposed before the evidence was closed; that there was no well-defined administrative issue upon which testimony could be presented; and that the Commission's report relies in part upon facts which were not introduced at the hearing.

VI.

Decisions Believed to Sustain Jurisdiction.

Columbia Broadcasting System, Inc., v. *United States*, 316 U. S. 407;

American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232;

Ann Arbor R. Co. v. *United States*, 281 U. S. 658.

It is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal and that the questions presented are substantial.

Copies of the opinion delivered by the Court upon the rendering of the decree sought to be reviewed and of the prior majority opinion referred to therein are attached to this statement as Appendices A and B, respectively.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
Attorneys for Columbia Broadcasting System, Inc.

Dated, November 25, 1942.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Intervenors*.

Before L. Hand, C. J., and Goddard and Bright, D. J.J.

On motions by the defendants for summary judgments dismissing the complaints herein in two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

Charles R. Denny for the Commission.

Charles E. Hughes, Jr., for the Columbia Broadcasting System, Inc.

John T. Cahill for the National Broadcasting Company, Inc.

L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily

to dismiss the complaint. The motions are made upon the complaints, upon certain affidavits of the counsel for the Commision, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pas the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws * * * relating to unlawful restraints * * * applicable to * * * interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so: the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessay in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting." The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this subdivision to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to § 303 of the Communications Act of 1934, that is, the interpolation of subdivision "g", confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally pre-supposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if § 303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," § 313 also took over from § 15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violatoin of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may * * * decree that the license of such licensee shall * * * be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with the general scheme, for a court

is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interests;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, § 13 was amended in 1934 by adding a new clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i. e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given, but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of § 311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the

power to make any regulations at all; nor can we see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public convenience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their

contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that they preferred the opportunities open to them under the "networks'" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners;" next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public convenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether, the Mutual Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believe that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest

case. That doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation. But that does not mean that the industry must be left to itself, the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiff's intervened in a proceeding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under § 402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious."

402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, § 405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;".

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed, and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

APPENDIX B.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

Before: L. Hand, C. J. and Goddard and Bright, D. JJ.

This cause came on to be heard at the January 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

LEARNED HAND (signed),
Circuit Judge.
HENRY W. GODDARD (signed),
District Judge.
——— ———,
District Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants.*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, *Defendant,*

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners.*

Before: L. Hand, C. J.: Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the complaints in two actions brought under sec. 402 (a) of Title

47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.

Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission.

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. HAND, *C. J.*:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under Sec. 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have coun-

tered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of

one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Sec. 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which, it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of Sec. 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have

thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which sec. 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character. (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. United States *v.* Baltimore & Ohio Railroad, 293 U. S. 454; Howell *v.* United States, 300 U. S. 276; Rochester Telephone Corporation *v.* United States, 307 U. S. 125; American Federation of Labor *v.* National Labor Relations Board, 308 U. S. 401, 408. (Colorado *v.* United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. *v.* United States, 285 U. S. 382; and United States *v.* Idaho, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon sec. 1 (20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. Shields *v.* Utah Idaho Central Railroad Company, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for examine the case in Venner *v.* Michigan Central, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commis-

sion sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, sec. 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis; to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in sec. 402 (b), (c), (d), (e), and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under sec. 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different

procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under sec. 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action agains the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two if its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under sec. 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of

Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. Sec. 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under sec. 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by sec. 1,102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any ndings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiff have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

(S.) LEARNED HAND,
(S.) HENRY W. GODDARD.

The Regulations adopted by the Federal Communications Commission, copies of which were attached to the original opinion are omitted for the reason that they are set forth in the preceding subdivision II of the Statement as to Jurisdiction.

APPENDIX C.

The Minute of October 31, 1941.

Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.